Hamdiah bt Ahmad & Anor v Pembangunan Tanah dan Perumahan Sdn Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCVC-213–10 OF 2018
EVROL MARIETTE PETERS JC
23 DECEMBER 2019

Civil Procedure — Locus standi — Sale and purchase of land — Deceased purchased land from defendant — Defendant failed to register land in name of deceased — Plaintiffs appointed as administratrices to estate of deceased — Whether plaintiffs had locus standi to institute action

Contract — Agreement — Sale and purchase of land — Deceased purchased land from defendant — Defendant failed to register land in name of deceased — Whether there was valid contract between deceased and defendant

Evidence — Documentary evidence — Sale and purchase documents — Admissibility of — Whether documents admissible — Evidence Act 1950 ss 32, 73A & 90

Land Law — Indefeasibility of title — Fraud — Competing interest on ownership of land — Whether nemo dat rule applied to defendant — Whether defendant committed fraud — Whether defendant estopped from counterclaiming — National Land Code ss 340(2)(a) & 340(4)(b)

Limitation — Trusts — Trust property — Whether defendant was holding property in trust for deceased — Whether plaintiffs' claim statute-barred — Limitation Act 1953 s 22

The plaintiffs were the beneficiaries and joint administratrices of the estate of one Siti Fatimah bt Hj Salman ('the deceased') who passed away on 7 December 1975. On 6 January 1968, the deceased purportedly entered into an agreement ('the 1968 agreement') with the vendors acting through one Syed Ali Mohamed Al-Attas ('Syed Ali') via a power of attorney for the purchase of a land ('Lot 747'). The plaintiffs claimed that after having fully paid the purchase price to the defendant, the deceased was then given vacant possession of the land by the defendant and the deceased proceeded to build a house on Lot 747, in which she and her family had occupied, ever since. Although the deceased and her family had occupied Lot 747, it was never registered in her

A name, but was registered in the defendant's name, and remained as such ever since. The defendant's case was that it was not the owner of Lot 747 as at 1 January 1968 and averred that it was impossible for it to have sold the land to the deceased. The defendant claimed that it had no records whatsoever of the purchase by the deceased, and disclaimed any form of association with the B plaintiffs and the deceased. The plaintiffs claimed for, inter alia, a declaration that the defendant was a trustee for the plaintiffs of Lot 747 and an order that the defendant execute the relevant instruments to effect transfer of Lot 747 to the plaintiffs. The defendant counterclaimed, inter alia, for vacant possession of Lot 747 and the caveat entered by the plaintiffs to be set aside. The issues for C consideration were: (a) whether there was a valid contract between the deceased and the defendant; (b) whether the 1968 agreement, receipts and letters were admissible; (c) whether the plaintiffs had locus standi to institute this action; (d) whether the *nemo dat* rule applied to the defendant; (e) whether the D defendant was holding Lot 747 in trust for the deceased; (f) whether the plaintiffs' claim was statute-barred; (g) whether the defendant was estopped from counterclaiming; and (h) whether the defendant had committed fraud.

Held, allowing the plaintiffs' claim with costs of RM20,000 and dismissing the E defendant's counterclaim:

(1) Although the defendant contended otherwise, in its letter dated 4 November 1978, it acknowledged Syed Ali as its director, and that Syed Ali, in such capacity, was acting on behalf of the defendant as the F registered owner, when the sales transaction of its property took place (see para 21).

(2) Although the objection by the defendant was made on the basis that the 1968 agreement, receipts and letters ('the documents') were hearsay, as the makers were unavailable, ss 32 and 73A of the Evidence Act 1950 G ('the EA'), which were exceptions to the rule against hearsay, would render these documents admissible. The documents were admissible, as their nature justified dispensing with the requirement of their makers. Furthermore, the documents were between 30 and 40 years old, which triggered the application of s 90 of the EA. The documents which were H adduced and tendered in court were connected and corroborated the plaintiffs' oral evidence. Therefore, the 1968 agreement, receipts, and letters were admissible in evidence. In view of that, Syed Ali was in fact acting in his capacity as director and was acting on behalf of the company, when the 1968 agreement was executed. The deceased had paid the full I purchase price and the defendant had accepted such payment and subsequently gave vacant possession to the deceased. The deceased had also paid all the related fees to the defendant for the land surveyor and issuance of grant, and even built a house on the land and had stayed there after she was given vacant possession, until her demise. The deceased was,

therefore, a purchaser in good faith and for valuable consideration, within s 5 of the National Land Code ('NLC') (see paras 23, 31–32 & 34–37).

(3) The plaintiffs, pursuant to s 13 of the Small Estates (Distribution) Act 1955, were appointed as administratrices to the estate of the deceased. The deceased had purchased Lot 747 from the defendant and had paid the full purchase price. The first plaintiff entered a private caveat on Lot 747 on three occasions, namely 2006, 2012 and 2016. Furthermore, there had been allegations and police reports on forged caveat withdrawal forms to facilitate the setting aside of the caveat on Lot 747. These circumstances, coupled with the fact that the plaintiffs were the administratrices of the deceased's estate, entitled the plaintiffs to commence this action against the defendant. This was reinforced by the fact that Lot 747 was supposed to be registered in the name of the deceased (see paras 40–42).

(4) The defendant's argument on the application of the *nemo dat* rule was flawed. Although the defendant may not have been the true owner when the 1968 agreement was executed on 6 January 1968, it was nevertheless the future owner, as all the rights in Lot 747 had been transferred to the defendant on 18 May 1968, rendering it to have good title to pass to the deceased, upon payment of the full purchase price. When the deceased entered into the agreement on 6 January 1968, the defendant sold the land, not as the owner of the land but as a party which was going to own the land, and which it subsequently did on 18 May 1968. Furthermore, since the defendant had received consideration for the 1968 agreement, and that the deceased had come into possession of Lot 747, the defendant was compelled to perform the contract (see paras 45 & 48).

(5) The defendant had permitted the deceased to enter and administer Lot 747. Although the defendant claimed there was no privity of contract with the deceased, the concept of trust was an exception to that rule. As such, the plaintiffs could enforce the trust against the defendant, as it would be unconscionable for the defendant to assert its right on the basis of its registered title, whilst denying the plaintiffs what was rightly theirs, bearing in mind that there was a strong element of unjust enrichment and lack of probity on the part of the defendant (see paras 52 & 54).

(6) By virtue of being a beneficiary under a trust, pursuant to s 22 of the Limitation Act 1953, the plaintiffs' claim was not statute barred. Neither the deceased nor her family had been asked by the defendant to vacate Lot 747. The defendant had never denied the deceased/plaintiffs' right to Lot 747. This went to buttress the plaintiffs' case that the limitation period started to run only from the first clear and unequivocal threat to dispossess the plaintiffs of Lot 747, which was the date the defendant filed their defence and counterclaim, that was on 18 January 2019. The

plaintiffs' claim, therefore, could not be statute barred. If the defendant had wished to exclude the deceased or plaintiffs, it ought to have taken possession of Lot 747, which it never did. As such, laches or delay was not a bar to this action, since the deceased's 'possession itself is an assertion on her part of her right under the contract of purchase, and acquiescence in his possession is a recognition by the defendant of this right' (see paras 55, 57–58 & 64).

(7) There was acquiescence on the part of the defendant. Moreover, the defendant had failed to explain why it had abandoned any form of claim to Lot 747 for over 40 years. This reinforced the plaintiffs' contention that the defendant should now be estopped from making any claim or demand against the plaintiffs, and that the plaintiffs were the rightful owners of Lot 747 (see paras 66–67).

(8) The defendant never registered the deceased as the owner, regardless of the knowledge that Lot 747 had been sold to the deceased. Instead, the defendant registered Lot 747 under its name. Furthermore, the plaintiffs' signature had been forged on the caveat withdrawal forms for which the director of the defendant, SD1, had been charged in the Magistrate's Court under s 468 of the Penal Code. In addition to the charges of forgery and cheating, it was also discovered that a purported consent judgment was entered for the purpose of removing the first plaintiff's caveat lodged over Lot 747. The irresistible inference was that the defendant had committed fraud over the years, through a series of conduct and omissions, to deny the right of the deceased/plaintiffs to Lot 747. The defendant's argument, based on its purported indefeasible title pursuant to s 340(1) of the NLC was also untenable, in view of the fact that fraud was an exception to the indefeasibility rule, as stipulated in s 340(2) of the NLC. A further exception which rendered defeasible the title of the defendant was s 340(4)(b) of the NLC. In the circumstances, s 340(4)(b) of the NLC allowed for justice to prevail over the inequitable circumstances that had denied the deceased's registration of Lot 747 in her name. The defendant's title was, therefore, defeated by both ss 340(2)(a) and (4)(b) of the NLC (see paras 72–74, 77–79 & 84).

(9) The was no basis to view the first plaintiff's evidence with circumspection. Her oral evidence was corroborated by documentary evidence which was incontrovertible, and the evidence of other witnesses. What was apparent was the absolute failure of the defendant to explain the documents which demonstrated that it had sold Lot 747 to the deceased. The documentary evidence was too overwhelming to be disputed by a mere denial. The plaintiffs had proved their claim on a balance of probabilities. There was an irresistible inference that a contract existed between the deceased and the defendant, and that upon payment of the full purchase price, the defendant became the bare

trustee/constructive trustee. The defendant, on the other hand, had not discharged its evidential burden (see paras 89, 91 & 94).

[Bahasa Malaysia summary

Plaintif adalah benefisiari dan pentadbir bersama harta pusaka seorang Siti Fatimah bt Hj Salman ('si mati') yang meninggal dunia pada 7 Disember 1975. Pada 6 Januari 1968, si mati dikatakan membuat perjanjian ('perjanjian 1968') dengan penjual bertindak melalui satu Syed Ali Mohamed Al-Attas ('Syed Ali') melalui satu surat kuasa untuk pembelian tanah ('Lot 747'). Plaintif mendakwa bahawa setelah membayar harga belian sepenuhnya kepada defendan, si mati kemudian diberi hak milik tanah oleh defendan dan si mati terus membina sebuah rumah di Lot 747, di mana dia dan keluarganya sejak itu duduki. Walaupun si mati dan keluarganya telah menduduki Lot 747, ia tidak pernah didaftarkan atas namanya, tetapi telah didaftarkan atas nama defendan, dan sejak itu kekal. Kes defendan adalah bahawa ia bukan pemilik Lot 747 pada 1 Januari 1968 dan menegaskan bahawa mustahil untuk menjual tanah itu kepada si mati. Defendan mendakwa bahawa ia tidak memiliki catatan apa pun mengenai pembelian oleh si mati, dan menolak sebarang bentuk kaitan dengan plaintif dan si mati. Plaintif menuntut, antara lain, perisytiharan bahawa defendan adalah pemegang amanah bagi plaintif terhadap Lot 747 dan perintah agar defendan melaksanakan instrumen yang berkaitan untuk melaksanakan pemindahan Lot 747 kepada plaintif. Defendan membuat tuntutan balas, antara lain, untuk milikan kosong Lot 747 dan kaveat yang dimasukkan oleh plaintif untuk diketepikan. Isu-isu untuk pertimbangan adalah: (a) sama ada terdapat kontrak yang sah antara si mati dan defendan; (b) sama ada perjanjian 1968, resit dan surat boleh diterima; (c) sama ada plaintif mempunyai locus standi untuk memulakan tindakan ini; (d) sama ada peraturan *nemo dat* terpakai kepada defendan; (e) sama ada defendan memegang Lot 747 sebagai amanah untuk si mati; (f) sama ada tuntutan plaintif dihalang undang-undang; (g) sama ada defendan dihalang daripada menuntut balas; dan (h) sama ada defendan telah melakukan penipuan.

Diputuskan, membenarkan tuntutan plaintif dengan kos RM20,000 dan menolak tuntutan balas defendan:

(1) Walaupun defendan berpendapat sebaliknya, dalam suratnya bertarikh 4 November 1978, pihaknya mengakui Syed Ali sebagai pengarahnya, dan bahawa Syed Ali, dalam keadaan sedemikian, bertindak atas nama defendan sebagai pemilik berdaftar, ketika transaksi penjualan hartanya berlaku (lihat perenggan 21).

(2) Walaupun bantahan oleh defendan dibuat atas dasar bahawa perjanjian 1968, resit dan surat ('dokumen') itu dengar cakap, oleh kerana pembuatnya tiada, ss 32 dan 73A Akta Keterangan 1950 ('EA'), yang merupakan pengecualian terhadap peraturan mengenai dengar cakap, akan menjadikan dokumen tersebut dapat diterima. Dokumen tersebut

dapat diterima, kerana sifatnya dibenarkan untuk menolak keperluan pembuatnya. Selanjutnya, dokumen tersebut berumur antara 30 hingga 40 tahun, yang menyebabkan penggunaan s 90 EA. Dokumen yang dikemukakan dan ditender di mahkamah mengaitkan dan mengesahkan keterangan lisan plaintif. Oleh itu, perjanjian 1968, resit, dan surat dapat diterima sebagai keterangan. Oleh itu, Syed Ali sebenarnya bertindak sebagai pengarah dan bertindak bagi pihak syarikat, ketika perjanjian 1968 dilaksanakan. Si mati telah membayar harga belian penuh dan defendan telah menerima pembayaran tersebut dan kemudian memberikan hak milikan kosong kepada si mati. Si mati juga telah membayar semua kos yang berkaitan kepada defendan untuk juruukur tanah dan pengeluaran geran, dan bahkan membina rumah di atas tanah dan tinggal di sana setelah dia diberi hak milikan kosong, hingga dia meninggal dunia. Oleh itu, si mati adalah pembeli berniat baik dan untuk balasan berharga, dalam s 5 Kanun Tanah Negara ('KTN') (lihat perenggan 23, 31–32 & 34–37).

(3) Plaintif, menurut s 13 Akta Harta Pusaka Kecil (Pembahagian) 1955, dilantik sebagai pentadbir harta pusaka si mati. Si mati telah membeli Lot 747 dari defendan dan telah membayar harga pembelian penuh. Plaintif pertama memasuki kaveat persendirian di Lot 747 dalam tiga peristiwa, iaitu 2006, 2012 dan 2016. Selanjutnya, terdapat tuduhan dan laporan polis mengenai borang penarikan kaveat palsu untuk memudahkan pengetepian kaveat di Lot 747. Keadaan ini, ditambah pula dengan hakikat bahawa plaintif adalah pentadbir harta pusaka si mati, yang berhak untuk menuntut tindakan ini terhadap defendan. Ini diperkuat oleh fakta bahawa Lot 747 seharusnya didaftarkan atas nama si mati (lihat perenggan 40–42).

(4) Hujahan defendan mengenai penggunaan peraturan *nemo dat* adalah salah. Walaupun defendan mungkin bukan pemilik yang sebenarnya ketika perjanjian 1968 dilaksanakan pada 6 Januari 1968, ia tetap menjadi pemilik masa depan, kerana semua hak di Lot 747 telah dipindahkan ke defendan pada 18 Mei 1968, menjadikannya memiliki hak milik sah untuk diserahkan kepada si mati, setelah membayar harga pembelian penuh. Ketika si mati membuat perjanjian pada 6 Januari 1968, defendan menjual tanah tersebut, bukan sebagai pemilik tanah tetapi sebagai pihak yang akan memiliki tanah itu, dan yang kemudian dilakukannya pada 18 Mei 1968. Selanjutnya, oleh kerana defendan telah menerima pertimbangan untuk perjanjian 1968, dan bahawa si mati telah memiliki Lot 747, defendan harus melaksanakan kontrak (lihat perenggan 45 & 48).

(5) Defendan telah membenarkan si mati memasuki dan mentadbir Lot 747. Walaupun defendan mendakwa tidak ada priviti kontrak dengan si mati, konsep amanah adalah pengecualian dari peraturan itu. Dengan

demikian, plaintif dapat menguatkasakan amanah terhadap defendan, kerana tidak wajar bagi defendan untuk menegaskan haknya berdasarkan hakmiliknya yang terdaftar, sementara menafikan plaintif apa yang benar-benar milik mereka, juga diingatkan bahawa terdapat unsur pengkayaan tidak adil dan ketidakjujuran pihak defendan (lihat perenggan 52 & 54).

(6) Dengan menjadi benefisiari di bawah amanah, menurut s 22 Akta Had Masa 1953, tuntutan plaintif tidak dilarang undang-undang. Baik si mati atau keluarganya tidak diminta oleh defendan untuk mengosongkan Lot 747. Defendan tidak pernah menolak hak si mati/plaintif atas Lot 747. Ini menyokong kes plaintif bahawa tempoh pembatasan hanya bermula dari ancaman pertama yang jelas dan tegas untuk membuang plaintif di Lot 747, yang merupakan tarikh defendan mengemukakan pembelaan dan tuntutan balas mereka, iaitu pada 18 Januari 2019. Oleh itu, tuntutan plaintif tidak boleh dihalang undang-undang. Sekiranya defendan ingin mengecualikan si mati atau plaintif, ia harus mengambil milikan Lot 747, yang tidak pernah dilakukannya. Oleh itu, laches atau kelewatan tidak menjadi penghalang kepada tindakan ini, kerana 'milikan si mati itu sendiri merupakan pernyataan haknya di bawah kontrak pembelian, dan persetujuan milikan olehnya adalah pengakuan oleh defendan terhadap hak ini' (lihat perenggan 55, 57–58 & 64).

(7) Terdapat persetujuan di pihak defendan. Lebih-lebih lagi, defendan telah gagal menjelaskan mengapa ia telah meninggalkan segala bentuk tuntutan terhadap Lot 747 selama lebih dari 40 tahun. Ini menguatkan pendapat plaintif bahawa defendan sekarang harus dihalang dari membuat dakwaan atau tuntutan terhadap plaintif, dan bahawa plaintif adalah pemilik sah Lot 747 (lihat perenggan 66–67).

(8) Defendan tidak pernah mendaftarkan si mati sebagai pemiliknya, walaupun terdapat pengetahuan bahawa Lot 747 telah dijual kepada si mati. Sebaliknya, defendan mendaftarkan Lot 747 dengan namanya. Tambahan pula, tandatangan plaintif telah dipalsukan pada borang penarikan kaveat yang mana pengarah defendan, SD1, telah didakwa di Mahkamah Majistret berdasarkan s 468 Kanun Keseksaan. Sebagai tambahan kepada tuduhan pemalsuan dan penipuan, juga didapati bahawa penghakiman persetujuan telah dibuat untuk tujuan membatalkan kaveat plaintif pertama yang dikemukakan atas Lot 747. Kesimpulan yang tidak boleh disangkal adalah bahawa defendan telah melakukan penipuan selama bertahun-tahun, melalui satu siri kelakuan dan pengabaian, untuk menolak hak si mati/plaintif terhadap Lot 747. Hujahan defendan, berdasarkan hak milik tidak boleh disangkal menurut s 340(1) KTN juga tidak dapat dipertahankan, berdasarkan fakta bahawa penipuan adalah pengecualian dari peraturan tidak boleh disangkal, sebagaimana dinyatakan dalam s 340(2) KTN. Pengecualian

A selanjutnya yang menjadikan hak milik defendan boleh disangkal adalah s 340(4)(b) KTN. Dalam keadaan tersebut, s 340(4)(b) KTN membenarkan keadilan berlaku atas keadaan yang tidak adil yang telah menolak pendaftaran Lot 747 atas nama si mati. Oleh itu, hak milik defendan dikalahkan oleh kedua-dua ss 340(2)(a) dan (4)(b) KTN (lihat
B perenggan 72–74, 77–79 & 84).

(9) Tiada asas untuk melihat keterangan plaintif pertama dengan waspada. Keterangan lisannya disokong oleh keterangan dokumen yang tidak dapat disangkal, dan keterangan saksi lain. Yang jelas adalah kegagalan
C mutlak defendan untuk menjelaskan dokumen yang menunjukkan bahawa ia telah menjual Lot 747 kepada si mati. Keterangan dokumentari terlalu banyak untuk dipertikaikan oleh penolakan semata-mata. Plaintif telah membuktikan tuntutan mereka berdasarkan keseimbangan kebarangkalian. Terdapat kesimpulan yang tidak dapat
D ditolak bahawa terdapat kontrak antara si mati dan defendan, dan bahawa setelah pembayaran harga pembelian penuh, defendan menjadi pemegang amanah/pemegang amanah konstruktif. Sebaliknya, defendan tidak melepaskan beban pembuktiannya (lihat perenggan 89, 91 & 94).]

E **Cases referred to**

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202, HC (refd)

Ang Hoi Yin v Sim Sie Hau [1969] 2 MLJ 3; [1968] 1 LNS 7 (refd)

Arab Merchant Bank Bhd v Chong On Foh Medical Hall & Liquor Dealers
F [1997] 4 MLJ 532; [1996] 2 CLJ 667, HC (refd)

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754, SC (refd)

Bank of Tokyo-Mitsubishi (Malaysia) Bhd v Sim Lim Holdings Bhd & Ors [2001] MLJU 125; [2001] 2 CLJ 474, HC (refd)

G *Besharapan Sdn Bhd & Ors v Agroco Plantation Sdn Bhd & Anor* [2007] 1 MLJ 101; [2006] 4 CLJ 878, CA (folld)

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62, CA (refd)

Dadourian Group International & Ors v Simms & Ors [2009] EWCA Civ 169, CA (refd)

H *Ghazali bin Arifin v Ahmad bin Bakar & Ors* [1992] 1 MLJ 282, HC (refd)

Goh Hooi Yin v Lim Teong Ghee & Ors [1990] 3 MLJ 23; [1990] 2 CLJ Rep 48, HC (refd)

Harold Elliott And H Elliott (Builders), Limited v Pierson [1948] Ch 452, ChD (refd)

I *Holroyd v Marshall* (1862) 11 ER 999, HL (refd)

JW Properties Sdn Bhd v Perbadanan Kemajuan Pertanian Selangor & Anor and another appeal [2016] 1 MLJ 341, CA (refd)

Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd & Ors [2014] 11 MLJ 422, HC (refd)

Kersah La' Usin v Sikin Menan [1966] 2 MLJ 20; [1964] 1 LNS 57 (refd)
Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano [1997] 1 MLJ 94; [1997] 1 CLJ 636, FC (refd)
Kubota Agricultural Machinery Sdn Bhd v Shahrizan Sdn Bhd & Anor [2001] MLJU 71; [2001] 6 CLJ 104, HC (refd)
Kwang Boon Keong Peter v Public Prosecutor [1998] 2 SLR 211, HC (refd)
Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697, FC (refd)
Lindsay Petroleum Co v Hurd (1874) LR 5 PC 221 (refd)
Lysaght v Edward [1876] 2 ChD 499, ChD (refd)
McAllister v Campbell [2014] NIQB 24, HC (refd)
Miller v Minister of Pensions [1947] 2 All ER 372, QBD (refd)
Mills v Haywood [1877] 6 Ch D 196, CA (refd)
Mt Bolo v Mt Koklan & Ors [1930] AIR PC 270, PC (refd)
Nasri v Mesah [1971] 1 MLJ 32, FC (refd)
Ong Chat Pang & Anor v Valiappa Chettiar [1971] 1 MLJ 224, FC (refd)
Samuel Naik Siang Ting v Public Bank [2015] 6 MLJ 1, FC (refd)
Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp & Ors [2009] 2 MLJ 765, CA (refd)
Sean Thornton v Northern Ireland Housing Executive [2010] NIQB 4, QBD (folld)
Sia Hiong Tee & Ors v Chong Su Kong & Ors [2015] 4 MLJ 188, FC (refd)
Sim Tiew Bee v Public Prosecutor [1973] 2 MLJ 200, FC (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1, FC (refd)
Sinniah a/l Pampayan v Muthuvelu Pillai a/l Palanichamy Pillai [1997] 1 MLJ 403, CA (refd)
Supreme Envy Sdn Bhd v Abul Rahim bin Sinon (suing and acting as personal representative and representing the estate of Sinon Bin Karnen, the deceased) & Anor [2017] 1 MLJ 43, CA (refd)
Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd [1926] AC 101, PC (refd)
Williams v Greatrex [1957] 1 WLR 31, CA (refd)
Wong Sin Meng v Wong Sam Moi [1991] 2 MLJ 277, HC (refd)
Yee Poh Nyen v Raji Bin Kasan & Ors [2018] MLJU 1108, CA (refd)

Legislation referred to

Evidence Act 1950 ss 32, 32(1), (1)(b), 73A, 73A(1), (2), (5), 90
Limitation Act 1953 ss 22, 22(1), 32
National Land Code ss 5, 340, 340(1), (2), (4)(b)
Penal Code s 468
Small Estates (Distribution Act) 1955 s 13

Rosli Kamaruddin (Azmi bin Ahmad Bakri and Muhammad Zahier bin Rosli) (Rosli Kamaruddin & Co) for the plaintiffs.
Omar Kutty bin Abdul Aziz (Kuah, Lim, Chin & Ooi) for the defendant.

Evrol Mariette Peters JC:

THE CLAIM

[1] This is the plaintiffs' claim for, inter alia, the following:

(a) a declaration that the defendant is a trustee for the plaintiffs, of the land held under GRN 315938 Lot 29445 Mukim Plentong, Daerah Johor Bahru, Johor ('Lot 747');

(b) an order that the defendant execute within seven days of this order, the relevant instruments to effect transfer of Lot 747 to the plaintiffs; and

(c) an order that in the event of the failure of the defendant to execute the relevant transfer instruments within seven days of the order, that the Pengarah Tanah dan Galian Negeri Johor or its relevant officer to effect transfer of Lot 747 to the plaintiffs.

[2] The defendant counterclaimed, inter alia, for vacant possession of Lot 747; the caveat entered by the plaintiffs to be set aside; damages arising from the loss of use of Lot 747; and an injunction to prevent the plaintiffs from entering any further caveat pursuant to Lot 747.

[3] I allowed the plaintiffs' claim and dismissed the defendant's counterclaim for the following reasons:

THE BRIEF FACTS

[4] The plaintiffs are individuals who are beneficiaries and joint administratrices of the estate of one Siti Fatimah bt Hj Salman ('the deceased') who passed away on 7 December 1975.

[5] On 6 January 1968, the deceased purportedly entered into an agreement ('the 1968 Agreement') with the vendors, Syed Jaffar bin Alwee, Syed Yahya bin Junid, Tengku Othman bin Abdullah and Syed Husain bin Junid (acting through one Syed Ali Mohamed Al-Attas ('Syed Ali') via a power of attorney dated 26 July 1967) for the purchase of Lot 747, at the purchase price of MYR2,274. The 1968 agreement is exhibited at pp 137–140 of Part C of the common bundle of documents ('CBD')).

[6] It is pertinent to note the role of Syed Ali in this transaction, who the plaintiffs claim represented the defendant, a development company.

[7] The plaintiffs further claim that after having fully paid the purchase price to the defendant, the deceased proceeded to build a house on Lot 747, in which

she and her family had occupied, ever since.

[8] Although the deceased and her family had occupied Lot 747, it was never registered in her name, but was registered in the defendant's name, and remained as such ever since.

THE PLAINTIFFS' CASE

[9] The plaintiffs' case is that the 1968 agreement was with Syed Ali, who not only represented the vendors, but was also a director of the defendant.

[10] Between the years of 1968 and circa 1971, the plaintiffs claimed that the deceased had made installment payments and eventually paid the full purchase price of Lot 747. Receipts for these payments were issued by the defendant and its solicitors, Goh Bin Lay & Co, exhibited respectively at pp 93–97 and 148–153 of Part C of the CBD. The receipts correspond with the *Jadual Bayaran Ranchangan Tanah Perumahan Saujana*, exhibited at p 147 of Part C of the CBD.

[11] After having paid the full purchase price, the deceased was given vacant possession of the land by the defendant (evidenced by letter exhibited at p 86 of Part C of the CBD). She then proceeded to build a house, in which she and her family had occupied, ever since.

[12] Lot 4868 which encompassed Lot 747 was registered in defendant's name pending subdivision and issuance of its individual title. However, following the issuance of the individual title, instead of registering Lot 747 in the name of the deceased, the defendant proceeded to register itself as the proprietor, and denied the deceased and subsequently the plaintiffs, lawful ownership of Lot 747.

[13] The plaintiffs called the following as their witnesses:

(a) Hamdiah bt Ahmad ('SP1') — the first plaintiff;

(b) Norbayah bt Mohamed As'ari ('SP2) — the second plaintiff;

(c) Chali @ Badri Mukibar @ Mukibat ('SP3) — Head of UMNO branch of Plentong;

(d) Mohd Shahrul Faizal bin Ali ('SP4') — a solicitor who testified to the forged caveat withdrawal forms; and

(e) Nasir bin Mohamad Asri ('SP5') — the son of the first plaintiff.

A THE DEFENDANT'S CASE

[14] The defendant's case is that it was not owner of Lot 747 as at 1 January 1968, and having been incorporated only on 23 December 1967, it became the owner of Lot 4648 only on 18 May 1968 after having the land transferred to it
B from one Kheng Hup Co Ltd ('Kheng Hup'). The defendant averred, therefore, that it was impossible for it to have sold the land to the deceased, since it was not the owner at the time.

[15] The defendant claimed that it had no records whatsoever of the
C purchase by the deceased, and disclaimed any form of association with the plaintiffs and the deceased.

[16] The defendant's sole witness was its director, one Lee Ban Heng
D ('SD1').

CONTENTIONS, EVALUATION AND FINDINGS

Whether there was a valid contract between the deceased and the defendant

E **[17]** The main issue for consideration is whether there was a valid contract between the deceased and the defendant, and whether the deceased was a purchaser in good faith for valuable consideration pursuant to s 5 of the National Land Code ('the NLC'), which reads:

F Section 5 — Interpretation

'purchaser' means a person or body who in good faith and for valuable consideration acquires title to, or any interest in land;

[18] It is pertinent to note that in determining the existence of a contract,
G inferences must be drawn from the language the parties have used, their conduct, regard being had to the surrounding circumstances, and the object of the contract. This was explained by Edgar Joseph Jr SCJ in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754, in the following words:

H As clear and helpful an enunciation of the principles as any which should guide the Court in determining the ever recurring question of whether there has been a contract between the parties is provided by Saville J in *Vitol BV v Compagnie Europeene des Petroles* [1988] 1 Lloyd's Rep 574, at 576 in the following words:

I The approach of the English law to questions of the true construction of contracts of this kind is to seek objectively to ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them — and that meaning is taken to represent what the parties intended. If the words are not so clear and admit of more than one sensible meaning, then the

> ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole. In some cases, of course, having attempted this exercise, it may simply remain impossible to give the words any sensible meaning at all in which case they (or some of them) are either ignored, that is to say, treated as not forming part of the contract at all, or (if of apparent central importance) treated as demonstrating that the parties never made an agreement at all, that is to say, had never truly agreed upon the vital terms of their bargain.

[19] A court when interpreting a contract, therefore, is not confined to the four corners of a document, but is entitled to look at the factual matrix forming the background to the transaction.

[20] The plaintiffs' case is that the 1968 agreement was with Syed Ali, who not only represented the vendors via a power of attorney, but was also a director of the defendant.

[21] Although the defendant contended otherwise, in its letter to one Encik Badri Mukibat, dated 4 November 1978 (exhibited at pp 125–129 of Part C of the CBD) it acknowledged Syed Ali as its director, and that Syed Ali, in such capacity, was acting on behalf of the defendant as the registered owner, when the sales transaction of its property took place circa 1968.

Whether the 1968 agreement, receipts, letters, etc are admissible

[22] Counsel for the defendant objected to several documents including the 1968 agreement, the receipts, letter granting vacant possession by the defendant and the letter dated 4 November 1978, acknowledging Syed Ali as its director ('these documents').

[23] In my view, although the objection was made on the basis that these documents were hearsay, as the makers were unavailable, ss 32 and 73A of the Evidence Act 1950 ('the Evidence Act'), which are exceptions to the rule against hearsay, would render these documents admissible.

[24] Section 32(1), in particular para (b) of the Evidence Act, is wide enough to cover all documents that were made in the ordinary course of business, including receipts. Section 32(1)(b) reads:

> Section 32 — *Cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant*
>
> (1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose

attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:

(b) when the statement was made by any such person in the *ordinary course of business*, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty; or of an *acknowledgment written or signed by him of the receipt of money,* goods, securities or property of any kind; or of a *document used in commerce*, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him; (Emphasis added.)

[25] According to s 32(1) of the Evidence Act, the unavailability of the witness must first be established: *Sim Tiew Bee v Public Prosecutor* [1973] 2 MLJ 200 (FC). In this case, all the documents were executed more than 40 years ago. The deceased was obviously no longer available, and tracing the makers of the other documents would have resulted in unreasonable delay and expense.

[26] Since the issue concerns documentary evidence in a civil case, reference is also made to s 73A(1) of the Evidence Act to render admissible, the disputed documents. The section reads:

Section 73A — *Admissibility of documentary evidence in civil cases, etc.*

(1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, *on production of the original document*, be admissible as evidence of that fact if the following conditions are satisfied:

(a) if the maker of the statement either —

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success. (Emphasis added.)

[27] Section 73A(1) of the Evidence Act requires the production of the original document. It is pertinent to note that during the course of the trial, the original documents were produced. As such, s 73A(1) is also applicable to render these documents admissible.

[28] Over and above ss 32(1)(b) and 73A(1) of the Evidence Act 1950, resort may also be had to s 73A(2) of the Evidence Act, which allows the judge to exercise his discretion to dispense with the maker of the document, if he is satisfied that undue delay or expense would otherwise be caused. The subsection reads:

> Section 73A — *Admissibility of documentary evidence in civil cases, etc.*
>
> (2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) *shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence* —
>
> (a) *notwithstanding that the maker of the statement is available but is not called as a witness*; and
>
> (b) notwithstanding that the original document is not produced, if, in lieu thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be. (Emphasis added.)

[29] The discretion prescribed by s 73A(2) of the Evidence Act was exercised not only in *Bank of Tokyo-Mitsubishi (Malaysia) Bhd v Sim Lim Holdings Bhd & Ors* [2001] MLJU 125; [2001] 2 CLJ 474, but also in *Arab Merchant Bank Bhd v Chong On Foh Medical Hall & Liquor Dealers* [1997] 4 MLJ 532; [1996] 2 CLJ 667, and *Kubota Agricultural Machinery Sdn Bhd v Shahrizan Sdn Bhd & Anor* [2001] MLJU 71; [2001] 6 CLJ 104.

[30] In exercising my discretion under s 73A(2) of the Evidence Act, I am guided also by s 73A(5) which reads:

> Section 73A — *Admissibility of documentary evidence in civil cases, etc*
>
> ...
>
> (5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of subsections (1) to (4), *the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances,* and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner, and, where the proceedings are with assessors, the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason, it appears to it to be

inexpedient in the interests of justice that the statement should be admitted. (Emphasis added.)

[31] Taking into account all the facts and circumstances of the case, these documents are admissible, as I am of the view that their nature justifies dispensing with the requirement of their makers.

[32] Furthermore, these documents were between 30 and 40 years old, which triggers the application of s 90 of the Evidence Act. Section 90 reads:

> Section 90 — *Presumption as to documents 20 years old*
>
> Where any document purporting or proved to be twenty years old is produced from any custody which the court in the particular case considers proper, *the court may presume that the signature and every other part of that document which purports to be in the handwriting of any particular person is in that person's handwriting*, and in the case of a document executed or attested, that it was *duly executed and attested* by the persons by whom it purports to be executed and attested.
>
> Explanation — Documents are said to be in proper custody if they are in the place in which and under the care of the person with whom they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.
>
> This explanation applies also to section 81.
>
> *Illustrations*
>
> (a) *A has been in possession of landed property for a long time. He produces from his custody documents relating to the land, showing his title to it. The custody is proper.*
>
> (b) A produces documents relating to landed property of which he is the chargee. The chargor is in possession. The custody is proper.
>
> (c) A, a connection of B, produces documents relating to lands in B's possession, which were deposited with him by B for safe custody. The custody is proper. (Emphasis added.)

[33] 'Having regard to s 90 of the Evidence Act, the court may presume the genuineness of the signatures of the purported vendor and purchaser and the thumbprint of the purported person who witnessed the execution of the agreement': per KC Vohrah in *Ghazali bin Arifin v Ahmad bin Bakar & Ors* [1992] 1 MLJ 282.

[34] Based on the above principles, it is undeniable that these documents which were adduced and tendered in court are connected and corroborate the plaintiffs' oral evidence.

[35] It is my finding, therefore, that the 1968 agreement, receipts, and letters are admissible in evidence. In view of that, it is also my finding that Syed Ali was in fact acting in his capacity as director and was acting on behalf of the company, when the 1968 agreement was executed.

[36] The deceased had paid the full purchase price and all the necessary taxes as well as other charges as required by the defendant, and the defendant had accepted such payment and subsequently gave vacant possession to the deceased. The deceased had also paid all the related fees to the defendant for the land surveyor and issuance of grant, and even built a house on the land and has stayed there after she was given vacant possession, until her demise.

[37] The deceased was, therefore, a purchaser in good faith and for valuable consideration, within s 5 of the NLC.

Whether the plaintiffs had locus standi to institute this action

[38] Counsel for the defendant argued that the plaintiffs had no locus standi to institute this action against the defendant, as they were not parties to the contract.

[39] According to *Ang Hoi Yin v Sim Sie Hau* [1969] 2 MLJ 3; [1968] 1 LNS 7, the general rule is that a person who sues as an administrator must have extracted letters of administration at the commencement of an action, for otherwise he would have no power to sue qua administrator, and that such writ must be set aside for being a nullity.

[40] On the facts of the present case, the deceased had passed away on 7 December 1975 and the plaintiffs, pursuant to s 13 of the Small Estates (Distribution Act) 1955, were appointed as administratrices to her estate via the letters of administration dated 3 November 2000 (exhibited at pp 80–81 of Part C of the CBD).

[41] Based on the facts of the case, the deceased had purchased Lot 747 from the defendant and had paid the full purchase price. She then built a house and occupied it with her family. The first plaintiff entered a private caveat on Lot 747 on three occasions, namely, 2006, 2012 and 2016. Furthermore, there have been allegations and police reports on forged caveat withdrawal forms to facilitate the setting aside of the caveat on Lot 747.

[42] These circumstances, coupled with the fact that the plaintiffs are the administratices of the deceased's estate entitled the plaintiffs to commence this action against the defendant. This is reinforced by the fact that the Lot 747 was supposed to be registered in the name of the deceased.

Whether the nemo dat rule applied to the defendant

[43] The defendant claimed that it could not have sold the land to the deceased because they only became the registered owner on 18 May 1968. Therefore, any transaction for the sale of land held under the larger Lot 4648, made between the defendant and any purchaser before 18 May 1968, would have been null and void, since the defendant did not possess title to the land prior to that date.

[44] The *nemo dat* rule based on the phrase 'nemo dat quod non habet' literally means that 'no one gives what they do not have'. The doctrine was explained by Arifin Zakaria CJ in *Sia Hiong Tee & Ors v Chong Su Kong & Ors* [2015] 4 MLJ 188 (FC), in the following words:

> The nemo dat rule literally means 'no-one can transfer what he has not got' (*Bishopsgate Motor Finance Corporation Ltd v Transport Brakes Limited* [1949] 1 KB 322 as per Denning LJ). This is sometimes called the 'derivation' principle: the transferee's rights derived from those of the transferor. *The nemo dat rule protects the true owner of the goods* (right of ownership) and the innocent purchaser who purchases the goods from non-owner gets no title as the non-owner could not pass good title because he has none. In other words, the right of the true owner is retained in the event of his possession is being stolen or sold to the unsuspecting purchaser. (Emphasis added.)

[45] In my view, the defendant's argument on the application of the *nemo dat* rule is flawed. Although the defendant may not have been the true owner when the 1968 agreement was executed on 6 January 1968, it was nevertheless the future owner, as all the rights in Lot 747 had been transferred to the defendant on 18 May 1968, rendering it to have good title to pass to the deceased, upon payment of the full purchase price.

[46] It is trite law that there is nothing inherently impossible in the performance of an agreement to sell land belonging to a third person. This means that 'one may contract to sell to another any defined subject-matter and can enforce the contract if by the time when he is obliged to do so, he has obtained a sufficient interest or can compel other interested parties to concur in the sale. It matters not at all that at the date of the contract he had no interest, if he obtained it in time to fulfil the bargain': per Harman J in *Harold Elliott And H Elliott (Builders), Limited v Pierson* [1948] Ch 452, which was adopted and approved by Edgar Joseph Jr J in *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23; [1990] 2 CLJ Rep 48. See also *Sinniah a/l Pampayan v Muthuvelu Pillai a/l Palanichamy Pillai* [1997] 1 MLJ 403 and *Kersah La' Usin v Sikin Menan* [1966] 2 MLJ 20; [1964] 1 LNS 57.

[47] I am guided also by the Court of Appeal in *Besharapan Sdn Bhd & Ors*

v Agroco Plantation Sdn Bhd & Anor [2007] 1 MLJ 101; [2006] 4 CLJ 878, where it was stated by Arifin Zakaria JCA (as he then was):

> Even though the second and third appellants did not have any registered right or interest in the subject land on the date of execution of the 1989 Agreement, that did not render the agreement, which was otherwise valid and enforceable, to be void or invalid. *The 2nd and 3rd appellants at the material time had sufficient interest in the subject land to enter into a binding agreement, by which they agreed to transfer the subject land when the title or interest in the subject land had been registered in their names*. In other words, the parties agreed that the agreement would only become enforceable the moment the 2nd and 3rd appellants' right or interest in the subject land was registered under the Ordinance. (Emphasis added.)

[48] Thus, when the deceased entered into the agreement on 6 January 1968, the defendant sold the land, not as the owner of the land but as a party which was going to own the land, and which it subsequently did on 18 May 1968. Furthermore, since the defendant had received consideration for the 1968 agreement, and that the deceased had come into possession of Lot 747, this court can compel the defendant to perform the contract: *Holroyd v Marshall* (1862) 11 ER 999.

Whether the defendant was holding Lot 747 in trust for the deceased

[49] The law on constructive trust has been elucidated by Jessel MR in *Lysaght v Edward* [1876] 2 ChD 499, as follows:

> It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the Court as to it. What is that doctrine? It is that *the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser*, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. *In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest)*, and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz, possession of the estate and a charge upon the estate for his purchase-money. (Emphasis added.)

[50] This principle has been assimilated in Malaysian Jurisprudence in numerous cases including *Samuel Naik Siang Ting v Public Bank* [2015] 6 MLJ 1; *Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd & Ors* [2014] 11 MLJ 422; *Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp & Ors* [2009] 2 MLJ 765; *JW Properties Sdn Bhd v Perbadanan Kemajuan Pertanian Selangor & Anor and another appeal* [2016] 1 MLJ 341 (CA): and

A *Supreme Envy Sdn Bhd v Abul Rahim bin Sinon (suing and acting as personal representative and representing the estate of Sinon Bin Karnen, the deceased) & Anor* [2017] 1 MLJ 43.

B **[51]** In *Samuel Naik Siang Ting v Public Bank* [2015] 6 MLJ 1, the law on constructive trust was distilled by the Federal Court, through Ramly Ali FCJ, in the following words:

> We are in full agreement and adopt the above well founded principles of law which, according to Jessel MR in Lysaght's case, 'has been settled for centuries'. Applying the said principles to the facts of the present case before us, we hold *that MPM, being the registered proprietor of the land after executing the sale and purchase agreements with the earlier purchasers and having received the full purchase price, was a bare trustee (that is, a person without beneficial interest in the property);* and to borrow the words of Jessel, MR in Lysaght's case ' ... the court will not permit the vendor afterwards to transfer the legal estate to a third person'. In other words, MPM in the present case, was therefore not permitted in law to sell or transfer the land to the new purchasers (including the appellant).
>
> The Court of Appeal was right in finding that MPM, after having entered in the sale and purchase agreements with the earlier purchasers and received the full payments of the purchase price, had become a bare trustee and as such was not permitted to deal with the lots. (Emphasis added.)

[52] In a similar vein, in the present case, the deceased had paid the full purchase price to the defendant and was given possession of Lot 747. The defendant, via a letter (exhibited at p 86 of Part C of the CBD) had even permitted the deceased to enter and administer Lot 747. The letter reads:

> Dengan gembira-nya di-maalomkan ya'itu Lot tanah yang tersebut di-atas yang tuan/puan beli dari kami telah siap di-beri tanda oleh pehak Juru Ukor kami.
>
> Dari itu dengan sukachita-nya kami serahkan tanah yang tersebut kepada tuan/puan, dan boleh-lah pehak tuan/puan memasokki dan mentadbirkan tanah tersebut dari tarikh tuan/puan menanda tangani borang yang disertakan.

[53] I also look to the case of *Supreme Envy Sdn Bhd v Abul Rahim bin Sinon (suing and acting as personal representative and representing the estate of Sinon bin Karnen, the deceased) & Anor* [2017] 1 MLJ 43 where Idrus Harun JCA (as he then was) held that the second respondent in that case, which was in a similar position as the defendant in this case, was a bare or constructive trustee.

[54] It is also pertinent to note that although the defendant claimed that there was no privity of contract with the deceased, the concept of trust is an exception to that rule. As such, the plaintiffs could enforce the trust against the defendant, as it would be unconscionable for the defendant to assert its right on the basis of its registered title, whilst denying the plaintiffs what is rightly theirs, bearing in mind that there was a strong element of unjust enrichment and lack

of probity on the part of the defendant: *JW Properties Sdn Bhd v Perbadanan Kemajuan Pertanian Selangor & Anor and another appeal* [2016] 1 MLJ 341, (CA).

Whether the plaintiffs' claim is statute-barred

[55] By virtue of being a beneficiary under a trust, pursuant to s 22 of the Limitation Act 1953, the plaintiffs' claim is not statute-barred. Section 22(1) of the Limitation Act 1953 reads:

> Section 22 — Limitation of actions in respect of trust property
>
> No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

Furthermore, it is trite law that the limitation period starts to run when 'there is a clear and unequivocal threat to dispossess the plaintiffs from the land by the defendant': *Nasri v Mesah* [1971] 1 MLJ 32. In this case, if at all limitation applies, time should run from the date of any infringement or threat of infringement of the plaintiffs' right under the 1968 agreement. See also *Mt Bolo v Mt Koklan & Ors* [1930] AIR PC 270, and *Wong Sin Meng v Wong Sam Moi* [1991] 2 MLJ 277.

[56] The facts reveal that the defendant had given the deceased possession of Lot 747, and that the deceased had built a house on it and occupied it since 1971, and had improved and repaired the house from time to time. All this while, neither the deceased nor her family had been asked by the defendant to vacate Lot 747.

[57] It appears, therefore, that the defendant had never denied the deceased/plaintiffs' right to Lot 747. This goes to buttress the plaintiffs' case that limitation period starts to run only from the first clear and unequivocal threat to dispossess the plaintiffs of Lot 747, which is the date the defendant filed their defence and counterclaim, that is, on 18 January 2019. The plaintiffs' claim, therefore, could not be statute-barred.

[58] The defendant further argued that the plaintiffs should be denied relief due to laches and delay. At this juncture, reference is made to s 32 of the Limitation Act 1953 which reads:

> Section 32 — Acquiescence

A Nothing is this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.

[59] Laches is established when two conditions are fulfilled. First and foremost, there must be unreasonable delay in the commencement or prosecution of proceedings. Secondly, in all the circumstances, the consequences of delay must render the grant of relief unjust.

[60] The often cited principle on laches is found in the enlightening passage by Lord Selborne in the landmark case of *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221:

> But in every case if an argument against relief which otherwise would be just is founded on mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay, and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy.

[61] Laches has been aptly described as 'inaction with one's eyes open' by Edgar Joseph Jr J (as he then was) in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202:

> Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such a delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: 14 *Halsbury's Laws of England* (3rd Ed) paras 1181, 1182. Laches has been succinctly described as 'inaction with one eye's open.

[62] The facts of the present case, however, demonstrate that the deceased, after being given vacant possession of Lot 747, remained in possession. This is an important factor as explained in *Williams v Greatrex* [1957] 1 WLR 31:

> That the purchaser having paid the deposits on and having entered into possession of the land, became the equitable owner of the land under a contract binding on the vendor such that the vendor could not now object to specific performance on the ground of laches unless he could show that he had not acquiesced in the purchaser's acts of possession or that the purchaser had abandoned the contract and that the evidence showed sufficient acquiescence by him and no abandonment by the

purchaser. Accordingly, despite the lapse of time, the purchaser was entitled to specific performance on payment of the balance of the price and interest thereon for the intervening years.

[63] Thus, if the defendant had wished to exclude the deceased or plaintiffs, it ought to have taken possession of Lot 747, which it never did. As such, laches or delay is not a bar to this action, since the deceased's 'possession itself is an assertion on her part of her right under the contract of purchase, and acquiescence in his possession is a recognition by the defendant of this right': *Mills v Haywood* [1877] 6 Ch D 196.

Is the defendant estopped from counterclaiming

[64] In fact, counsel for the plaintiffs argued that it is the defendant which is estopped from counterclaiming due to its inaction in the last 45 years or so.

[65] The undisputed facts that the deceased had built a house on Lot 747 and stayed there since vacant possession was given; improved and repaired the house from time to time; and more importantly had never been asked or demanded to vacate Lot 747, demonstrated acquiescence on the part of the defendant.

[66] In fact, the defendant had failed to explain why it had abandoned any form of claim to Lot 747 for over 40 years. This reinforces the plaintiffs' contention that the defendant should now be estopped from making any claim or demand against the plaintiffs, and that the plaintiffs are the rightful owners of Lot 747.

Whether the defendant had committed fraud

[67] The concept of fraud has always been a complexed one to deal with. Although it is a generic term, under its umbrella are numerous examples which are impossible to enumerate.

[68] Fraud has been described to include all 'acts, omissions, and concealments which involve a breach of a legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat any one is considered fraud. Fraud in all cases implies a wilful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to': per Jeffrey Tan FCJ in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697 (FC).

[69] The subsequent issue revolves around how to prove fraud. Bearing in mind the difficulty of obtaining direct evidence, it has been held that fraud may be established via circumstantial evidence. As was stated by Lady Justice Arden in *Dadourian Group International & Ors v Simms & Ors* [2009] EWCA Civ 169, if only direct evidence was admissible in establishing fraud, 'few allegations of fraud would ever come to trial. Fraudsters rarely sit down and reduce their dishonest agreement to writing'.

[70] This comment was approved by the Court of Appeal in *Yee Poh Nyen v Raji Bin Kasan & Ors* [2018] MLJU 1108, where it was stated by Tengku Maimun JCA (as she then was) that the law does not require direct evidence, but recognises that frauds are commonly proved on the basis of inviting the fact-finder to draw proper inferences from primary facts:

> Fraud in actions seeking to affect a registered title means actual fraud or dishonesty of some sort and not what is called constructive or equitable fraud (see *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81). Whether fraud exist is a question of fact which is to be determined in the light of the facts and circumstances surrounding each particular case (see *PJTV Denson (M) Sdn Bhd v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136; *Suratmin Othman v Yusof Omar & Ors* [1997] MLJU 203; [1998] 2 CLJ Supp 380). Fraud may occur where the designed object of a transfer is to cheat a person of any existing right or where by a deliberate and dishonest act a person is deprived of his existing right (see *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196).

[71] The facts that support the allegations of fraud are that after full payment had been made for Lot 747, and after the defendant obtained subdivision of Lot 4648 to individual grant title, it never registered the deceased as the owner, regardless of the knowledge that Lot 747 had been sold to the deceased. Instead, the defendant registered Lot 747 under its name, despite the deceased having settled the full purchase price.

[72] Furthermore, an unsettling fact about this case is that the plaintiffs' signature had been forged on the caveat withdrawal forms for which the director of the defendant, SD1, has been charged in the Magistrate's Court under s 468 of the Penal Code, which reads:

> Section 468 — Forgery for the purpose of cheating
>
> Whoever commits *forgery,* intending that the document forged shall be used for the purpose of *cheating,* shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine. (Emphasis added.)

[73] In addition to the charges on forgery and cheating, it was also discovered that a purported consent judgment was entered between one Kawate Yukio and the defendant under Case Number JA-22NCVC-155–07 of 2018, for the purpose of removing the first plaintiff's caveat lodged over

Lot 747. Pursuant to this development, the plaintiffs' solicitors lodged a police report dated 23 September 2018 (exhibited at p 67 of Part B of the CBD), and filed a notice of application dated 23 September 2018 to intervene and set aside the consent judgment (exhibited at pp 69–72 of Part B of the CBD), on the basis that there was collusion between this so-called Kawate Yukio and the defendant.

[74] Although there has not been any conviction for these charges which are connected to depriving the deceased/plaintiffs of their rights pursuant to the land, it must be remembered that the standard of proving fraud is now on a balance of probabilities, and not as high as that required in criminal cases, that is beyond a reasonable doubt: *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1. See also *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to Sl Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697.

[75] Furthermore, if the designed object of a transfer is to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear: *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101

[76] Taking into account all the evidence adduced thus far, coupled with the disconcerting facts regarding the offence with which SD1 had been charged, and the purported sham consent judgment, the irresistible inference by this court is that the defendant had committed fraud over the years, through a series of conduct and omission, to deny the right of the deceased/plaintiffs to Lot 747.

[77] The defendant's argument, based on its purported indefeasible title pursuant to s 340(1) of the NLC is also untenable, in view of the fact that fraud is an exception to the indefeasibility rule, as stipulated in s 340(2) of the NLC. Section 340 reads:

> Section 340 — Registration to confer indefeasible title or interest, except in certain circumstances
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease charge or easement is for the being registered, shall subject to the following provisions of this section, be indefeasible
>
> (2) The title or interest of any person or body shall not be indefeasible —
>
> (a) *in any case of fraud* or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

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(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

B

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) —

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

C

(b) any interest subsequently granted there out shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

D

(4) Nothing in this section shall prejudice or prevent —

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

E

(b) *the determination of any title or interest by operation of law.* (Emphasis added.)

F

[78] A further exception which renders defeasible the title of the defendant is s 340(4)(b) of the NLC, as emphasised above.

[79] On the application s 340(4)(b) of the NLC, it was held in *Ong Chat Pang & Anor v Valiappa Chettiar* [1971] 1 MLJ 224, referring to *Das on Torrens System in Malaysia*:

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> 'operation in law' is a generic term deliberately used by the legislature to grant relief in cases where *contractual or conscientious obligations* (importing a breach of duty to which equity has attached its sanction) are *undertaken by or imposed on the registered proprietor either at law or in equity*. (Emphasis added.)

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[80] This passage was endorsed by Gopal Sri Ram JCA in the Federal Court case of *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94; [1997] 1 CLJ 636, FC and at p 645, where in explaining that

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'Parliament does not legislate in vain' by the use of meaningless words and phrases, His Lordship further explained the meaning of s 340(4)(b) of the NLC, in the following words:

> In our judgment, Parliament enacted section 340(4)(b) for the purpose of dealing with fact patterns that do not fall squarely within the other exceptions to

indefeasibility that appear in the second subsection to s 340 of the Code. While recognising that it is neither possible, nor desirable to predict with any degree of certainty the wide range of cases that, while failing to come within the vitiating categories specified by the second subsection, may yet come within the scope of s 340(4)(b), ...

[81] Since the defendant has invoked s 340(1) of the NLC, it behoves me to draw the parties' attention to s 340(4)(b) of the NLC, which is an alternative provision that may render defeasible the registered title of the defendant.

[82] On the facts of the present case, the defendant had accepted all payments from the deceased, and granted her vacant possession of Lot 747, yet failed to register Lot 747 in her name.

[83] In these circumstances, s 340(4)(b) of the NLC allows for justice to prevail over the inequitable circumstances that have denied the deceased registration of Lot 747 in her name. The defendant's title is, therefore, defeated by both ss 340(2)(a) and 340(4)(b) of the NLC.

APPRECIATION AND EVALUATION OF EVIDENCE

[84] It is trite law that, apart from applying the standard of proof required by law, a trier of fact, in order to arrive at a decision according to law, must judicially appreciate the evidence led before him upon the issue called for resolution. A decision arrived in the absence of a judicial appreciation of evidence is liable to appellate correction. 'Judicial appreciation is concerned with the process of evaluating the evidence for the purpose of discovering where the truth lies in a particular case. It includes, but is not limited to, identifying the nature and quality of the evidence, assigning such weight to it as the trier of fact deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case and assessing the demeanour of witnesses': per Gopal Sri Ram JCA (as he then was) in *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62.

[85] With regard to the credibility of witnesses, reference is made to s 146 of the Evidence Act, which reads:

Section 146 — *Questions lawful in cross-examination*

When a witness may be cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend —

(a) to test his accuracy, veracity or credibility;

(b) to discover who he is and what is his position in life; or

A (c) to shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

B **[86]** Credibility concerns the opportunities for a power of observation of the witness, his accuracy for recollection, and capacity to explain what he remembers: *Kwang Boon Keong Peter v Public Prosecutor* [1998] 2 SLR 211.

C **[87]** I also find instructive the words of Gillen J in *Sean Thornton v Northern Ireland Housing Executive* [2010] NIQB 4 which was adopted in *McAllister v Campbell* [2014] NIQB 24:

> [12] Credibility of a witness embraces not only the concept of his truthfulness ie whether the evidence of the witness is to be believed but also the objective reliability
D of the witness ie his ability to observe or remember facts and events about which the witness is giving evidence.
>
> [13] In assessing credibility the court must pay attention to a number of factors which, inter alia, include the following:
>
> E (a) The inherent probability or improbability of representations of fact
>
> (b) The presence of independent evidence tending to corroborate or undermine any given statement of fact
>
> (c) The presence of contemporaneous records
>
> F (d) The demeanour of witnesses e.g. does he equivocate in cross examination
>
> (e) The frailty of the population at large in accurately recollecting and describing events in the distant past.
>
> (f) Does the witness take refuge in wild speculation or uncorroborated
G allegations of fabrication
>
> (g) Does the witness have a motive for misleading the court
>
> (h) Weigh up one witness against another

H **[88]** Although the first plaintiff herself was an octogenarian, and was hard in hearing, she answered to the best of her ability. I did not find any basis to view her evidence with circumspection. In any event, her oral evidence was corroborated by documentary evidence which was incontrovertible, and the evidence of other witnesses.

I **[89]** The defendant, on the other hand produced only one witness, namely its director, SD1. In a nutshell, his evidence was of a total denial of the contract between the deceased and the defendant, and of all the documents in support thereof. He claimed to have taken over the defendant sometime in 2014, but

admitted that upon conducting due diligence on the defendant, he became aware of the claims made.

[90] What was apparent was the absolute failure of the defendant to explain several documents, namely, the receipt of payments accepted by it throughout the years, the letters acknowledging receipt of payments, the letter giving vacant possession, and all documents which demonstrated that it had sold Lot 747 to the deceased. The documentary evidence was too overwhelming to be disputed by a mere denial.

[91] It must be borne in mind that although the legal burden was imposed on the plaintiffs to prove their case on a balance of probabilities, in actual fact the plaintiffs had to convince the court that their case was more probable than not: *Miller v Minister of Pensions* [1947] 2 All ER 372.

[92] The defendant, on the other hand, had the evidential burden to raise sufficient evidence to ensure that the probabilities were either equal or tilted in its favour.

[93] On the totality of the evidence presented, the plaintiffs had proved their claim on a balance of probabilities. In fact, there was an irresistible inference that a contract existed between the deceased and the defendant, and that upon payment of the full purchase price, the defendant became the bare trustee/constructive trustee. The defendant, on the other hand, had not discharged its evidential burden.

CONCLUSION

[94] Based on the aforesaid reasons, and after judicious consideration of all the evidence before me, both oral and documentary, and submissions of counsel for both parties, I allowed the plaintiffs' claim with costs in the amount of MYR20,000 (subject to allocatur fees), and dismissed the defendant's counterclaim.

Plaintiffs' claim allowed with costs of RM20,000 and defendant's counterclaim dismissed.

Reported by Nabilah Syahida Abdullah Salleh